No. 79-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,
Petitioner,

v.

RADCLIFF MATERIALS, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF AMICUS CURIAE THE MEAD CORPORATION IN SUPPORT OF PETITIONER TEXAS INDUSTRIES, INC.

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE RIGHT TO CONTRIBUTION AMONG DEFENDANTS IN ANTITRUST CASES SHOULD BE RECOGNIZED BY THIS COURT	5
II. CONTRIBUTION IN ANTITRUST CASES WOULD ELIMINATE SETTLEMENT COERCION SUCH AS THAT WHICH OCCURRED IN THE CORRUGATED CONTAINER ANTITRUST LITIGATION	8
A. The Settlement History	8
B. The Settlements Were Extortionate	12
III. CONTRIBUTION IN ANTITRUST CLASS ACTIONS WOULD PREVENT THE MISUSE OF RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE	16
CONCLUSION	23

TABLE OF AUTHORITIES

CASES Page

Alsup v. *Montgomery Ward & Co.*, 57 F.R.D. 89 (N.D. Cal. 1972) 15
Arth Main Street Drugs v. *Beer Distributors, Inc.*, 26 F.R. Serv. 2d 87 (N.D. Ind. 1978) 15
Cackling Acres, Inc. v. *Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977) 6
City of Detroit v. *Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) 8
City of Philadelphia v. *American Oil Co.*, Civ. No. 647-68 (D.N.J. 1971) 20
Cooper Stevedoring Co. v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974) 5
Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) 16
Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) 5
Eisen v. *Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968) 17
Eisen v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and class action dismissed on other grounds*, 417 U.S. 156 (1974) 21
Glus v. *G.C. Murphy Co.*, 629 F.2d 248 (3d Cir. 1980) 5, 6
Gomes v. *Brodhurst*, 394 F.2d 465 (3d Cir. 1967) .. 7
Hawaii v. *Standard Oil Co.*, 405 U.S. 251 (1972) .. 22
Heizer Corp. v. *Ross*, 601 F.2d 330 (7th Cir. 1979) 5
Hooley v. *Red Carpet Corp. of America*, 1975 Trade Cas. ¶ 60,285 (D. Ore. 1975), *appeal dismissed*, 549 F.2d 643 (9th Cir. 1977) 15, 16
In re Corrugated Container Antitrust Litigation, 80 F.R.D. 244 (S.D. Tex), *mandamus denied*, No. 78-3684 (5th Cir. December 29, 1978) 2
Judson v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A.2d 24 (1954) 7
Kline v. *Coldwell, Banker & Co.*, 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) 14, 16, 17

TABLE OF AUTHORITIES—Continued

Page

Kohr v. *Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) 5, 6
Little Rock School District v. *Borden, Inc.*, 1980-1 Trade Cas. ¶ 63,059 (E.D. Ark. 1979) 7
Mead Corp. v. *Alton Box Board Co.*, Civ. No. 4-79-245 (D. Minn. 1979) 3
Mid-West Paper Products Co. v. *Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979) 11, 16
Olson Farms, Inc. v. *Safeway Stores, Inc.*, 1977-2 Trade Cas. ¶ 61,698 (D. Utah 1977), *aff'd*, 1979-2 Trade Cas. ¶ 62,995 (10th Cir. 1979) 6
Professional Beauty Supply, Inc. v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979) 6, 7
Reiter v. *Sonotone Corp.*, 442 U.S. 330 (1979) 16
Shapiro v. *General Motors Corp.*, 472 F. Supp. 636 (D. Md. 1979) 14, 15
Smith v. *Beneficial Finance Co.*, Civ. Nos. 860-71, 861-71, 862-71 (D.N.J. 1971) 17
Snyder v. *Harris*, 394 U.S. 332 (1969) 21
United States v. *Indrelunas*, 411 U.S. 216 (1973) .. 3
United States v. *Reliable Transfer Co.*, 421 U.S. 397 (1975) 5
Wassel v. *Eglowsky*, 399 F. Supp. 1330 (D. Md. 1975), *aff'd*, 542 F.2d 1235 (4th Cir. 1976) 5
Wilson P. Abraham Construction Corp. v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979), *cert. granted sub nom. Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, No. 79-1144 (1980) 3, 23

STATUTE

Clayton Act, 15 U.S.C. § 15 ..... 16, 21

FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. P. 23 ..... 2, 4, 14, 16, 17, 21
Fed. R. Civ. P. 54(b) 3
Fed. R. Civ. P. 58 3

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BRIEF OF AMICUS CURIAE THE MEAD CORPORATION IN SUPPORT OF PETITIONER TEXAS INDUSTRIES, INC.

The Mead Corporation ("Mead") submits this brief as amicus curiae in support of petitioner Texas Industries, Inc.[1] Mead respectfully submits that this Court should hold that defendants may assert rights of contribution and claim reduction in antitrust cases.

INTEREST OF AMICUS CURIAE

Mead is one of 37 corrugated container manufacturers named as defendants in one or more of over 60 treble damage antitrust class and nonclass actions alleging a nationwide conspiracy to fix the prices of corrugated containers and sheets in the *Corrugated Container*

[1] Counsel for petitioner and counsel for respondents have consented in writing to the filing of this amicus curiae brief. The written consents of all parties to this case are being filed concurrently with this brief pursuant to Rule 36.2 of the Rules of the United States Supreme Court.

Antitrust Litigation, M.D.L. 310 (S.D. Tex.). Mead is the only defendant in M.D.L. 310 which did not settle the class action cases. On September 3, 1980, after a three month trial, a jury returned an adverse verdict to Mead, although no final judgment has yet been entered. Without rights of contribution or claim reduction, plaintiffs claim that Mead, having approximately 2½% of the market, is nevertheless liable in M.D.L. 310 on the basis of industry-wide sales.

On September 6, 1978, the district court in M.D.L. 310, purportedly under Rule 23 of the Federal Rules of Civil Procedure, certified a national class of all purchasers of corrugated containers or corrugated sheets from defendants from January 1, 1960 to January 25, 1978, estimated to include 300,000 members. *In re Corrugated Container Antitrust Litigation*, 80 F.R.D. 244 (S.D. Tex.), *mandamus denied*, No. 78-3684 (5th Cir. Dec. 29, 1978).

Thereafter, and as a direct result of that class certification, plaintiffs in M.D.L. 310 engaged in an unprecedented five-week settlement "stampede" from late December 1978 to January 1979, which resulted in 24 defendants collectively paying more than $288 million in 22 separate settlements. With each successive settlement, plaintiffs demanded and received amounts at a higher rate than prior settlements without regard to the merits of their claims. Plaintiffs were able to escalate their settlement demands by refusing to remove the sales of settling defendants from the litigation. As a result, plaintiffs threatened each remaining nonsettling defendant with exposure to damage claims based upon the sales of each settling defendant.

In M.D.L. 310, three defendants filed motions to assert cross claims for contribution and an affirmative defense of claim reduction. On May 16, 1979, the district court denied the motions. On October 30, 1979, the Court of Appeals for the Fifth Circuit summarily affirmed the

district court's denial of the motions for contribution and dismissed the appeals with respect to claim reduction. The court, without analysis, accepted as controlling authority its decision in *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979), *cert. granted sub nom. Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, No. 79-1144 (1980), in which the Fifth Circuit held that there were no rights of contribution for antitrust defendants.

Mead has a vital and legitimate interest in the issue of contribution among antitrust defendants and in the outcome of this appeal. Mead has asserted, and continues to seek, rights to contribution in its complaint filed on May 21, 1979 in the District Court for the District of Minnesota, *The Mead Corporation* v. *Alton Box Board Co.*, Civ. No. 4-79-245. The Judicial Panel on Multidistrict Litigation transferred Mead's complaint to the Southern District of Texas for consolidation in M.D.L. 310 (Civ. No. H-79-1436). While the district court on December 21, 1979 filed an opinion dismissing Mead's claim for contribution, no final judgment has ever been entered dismissing Mead's complaint, as required by either Rule 58 or Rule 54(b) of the Federal Rules of Civil Procedure. *See United States* v. *Indrelunas*, 411 U.S. 216 (1973). On January 3, 1980, Mead filed a motion for reconsideration and on January 21, 1980, plaintiffs filed their objections to the motion. The district court has never ruled on that motion. Thus, no final and separate judgment has yet been entered by the district court from which Mead can appeal.

In M.D.L. 310, Mead also filed a motion to amend its answer to assert the affirmative defense of claim reduction, which is a mechanism to implement contribution where there have been settlements with plaintiffs by some, but not all, defendants. The district court initially denied Mead's motion as premature prior to the jury verdict, but at that time did not enter a final and sepa-

rate judgment. Following the jury verdict, the district court, on December 1, 1980, denied Mead's motion for claim reduction, but no final judgment has yet been entered.

SUMMARY OF ARGUMENT

The *Corrugated Container Antitrust Litigation*, M.D.L. 310, not only represents one of the largest antitrust cases in history, but also represents the most egregious abuse of the class action device to date. The absence of rights of contribution and claim reduction among antitrust defendants has resulted in coercive escalation settlement tactics by plaintiffs and a blatant perversion of Rule 23 of the Federal Rules of Civil Procedure. The escalation settlements extracted by plaintiffs in M.D.L. 310 conclusively demonstrate the fundamental necessity for rights of contribution and claim reduction in antitrust cases. In the absence of such rights, an innocent defendant is relegated to the unacceptable choice of trying a lawsuit with potential multimillion dollar damage exposure or agreeing to an extortionate settlement on a take it or leave it basis.

Rights of contribution and claim reduction among antitrust defendants will (1) eliminate the manifest unfairness of coercive escalation settlements to nonsettling defendants, (2) prevent the most culpable defendants from escaping significant liability through "sweetheart" settlements, and (3) increase the deterrence of the antitrust laws. Recognition of rights of contribution and claim reduction among antitrust defendants would proportion liability and ultimately damages to relative market size and other legitimate factors. The settlement process would not be exploited by coercion, and settling and nonsettling defendants alike would not be victimized by the happenstance of a successive escalation settlement timetable. The confluence of joint and several liability, class certification, and treble damages compels that rights of contribution and claim reduction be recognized in antitrust cases.

ARGUMENT

I. THE RIGHT TO CONTRIBUTION AMONG DEFENDANTS IN ANTITRUST CASES SHOULD BE RECOGNIZED BY THIS COURT.

This Court should recognize rights of contribution and claim reduction in antitrust cases to promote the deterrent policies of the antitrust laws and to ensure fairness in the apportionment of damages among antitrust defendants.

Contribution has been recognized in various areas of federal law. In *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 111 (1974), this Court established the right to contribution in maritime noncollision cases. Federal courts have also recognized contribution rights in employment discrimination cases,[2] securities cases[3] and airline disaster cases.[4]

In *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 111 (1974), this Court held that contribution was necessary to ensure fairness:

> [A] "more equal distribution of justice" can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame.

This Court in *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 405 (1975), ruled that fairness compelled an equitable system of damage allocation based upon comparative fault. In *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 271-72 n.30 (1979), this

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[2] *Glus* v. *G.C. Murphy Co.*, 629 F.2d 248 (3d Cir. 1980).

[3] *Heizer Corp.* v. *Ross*, 601 F.2d 330, 332-33 (7th Cir. 1979); *Wassel* v. *Eglowsky*, 399 F. Supp. 1330, 1367 (D. Md. 1975), *aff'd*, 542 F.2d 1235 (4th Cir. 1976).

[4] *Kohr* v. *Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975).

Court declared that a tortfeasor "[n]ormally . . . may seek contribution from another concurrent tortfeasor.... Contribution remedies the unjust enrichment of the concurrent tortfeasor...."

In *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179, 1185-86 (8th Cir. 1979), the Eighth Circuit held that fundamental fairness requires recognition of contribution in antitrust actions:

> There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer.

See also Glus v. *G.C. Murphy Co.*, 629 F.2d 248, 252 (3d Cir. 1980); *Kohr* v. *Allegheny Airlines, Inc.*, 504 F.2d 400, 405 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975).

Contribution would promote the underlying policies of the antitrust laws. It would advance the disgorgement and deterrence objectives of the antitrust laws by ensuring that antitrust violators will be held accountable for their conduct. Without contribution, antitrust violators may obtain preferential "sweetheart settlements" irrespective of their relative market share or the merits of plaintiff's claims, or may completely escape liability. *See Cackling Acres, Inc.* v. *Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977); *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1977-2 Trade Cas. ¶ 61,698 (D. Utah 1977), *aff'd*, 1979-2 Trade Cas. ¶ 62,995 (10th Cir. 1979). The denial of contribution would undermine and "dilute the deterrent effect of the antitrust laws." *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179, 1185 (8th Cir. 1979).

The lack of contribution unfairly forces an antitrust defendant to absorb the consequences not only of his own

acts but also those of other defendants. A right to contribution is especially necessary in antitrust cases where joint and several liability and mandatory treble damages are coupled with massive class action damage exposure, such as in M.D.L. 310.

Recognition of contribution would promote fair settlements based upon the merits of the case. Final settlements can be achieved when contribution is coupled with claim reduction, which reduces claims against nonsettling defendants by an amount fairly allocable to the acts of settling defendants where there have been settlements by some, but not all, defendants. Claim reduction would protect nonsettling defendants' rights to contribution and settling defendants' interests in finality by treating settlements as providing plaintiffs with full satisfaction for any damages attributable to settling defendants' acts. *See Gomes* v. *Brodhurst*, 394 F.2d 465, 467 (3d Cir. 1967); *Little Rock School District* v. *Borden, Inc.*, 1980-1 Trade Cas. ¶ 63,059 (E.D. Ark. 1979); *Judson* v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 93, 110 A.2d 24, 36-37 (1954). Recognition of contribution and claim reduction in antitrust cases would encourage voluntary settlements, foster the equitable distribution of liability among antitrust defendants, eliminate collusion, and bring "peace" to settling defendants.

Contribution would not complicate antitrust cases. It would not add new substantive issues or present procedural manageability problems. A defendant's liability for contribution would be established according to the same substantive standard used by plaintiff to prove antitrust liability. The argument that contribution would complicate antitrust actions has been rejected. *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179, 1185 (8th Cir. 1979).

II. CONTRIBUTION IN ANTITRUST CASES WOULD ELIMINATE SETTLEMENT COERCION SUCH AS THAT WHICH OCCURRED IN THE CORRUGATED CONTAINER ANTITRUST LITIGATION.

Although settlements in antitrust cases have been historically favored, plaintiffs' settlement tactics in M.D.L. 310 have completely perverted the settlement process and have "upset the delicate settlement balance by giving too great an advantage to the claimants—an advantage that is not required by the antitrust laws and one which might well hinder the highly favored practice of settlement." *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 459 (2d Cir. 1974). Recognition of contribution and claim reduction among antitrust defendants would not only eliminate settlement coercion, but would also restore the delicate settlement balance which was destroyed by plaintiffs in M.D.L. 310. Furthermore, the availability of contribution would prevent the negotiation of "sweetheart" settlements in which more culpable defendants settle early and cheaply to the detriment of the remaining firms.[5]

A. The Settlement History.

Plaintiffs negotiated the settlements in M.D.L. 310 based on market share or "points." Points equal an individual defendant's percentage of all defendants' sales of corrugated containers and sheets.[6] Plaintiffs classified defendant corporations into three groups—felony indictees, misdemeanor indictees, and unindicted corporations

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[5] *See* S. Rep. No. 428, 96th Cong., 1st Sess. 2 (1979); *The Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 72 (1979) (statement of Robert P. Taylor, Director, ABA Task Force on Contribution).

[6] Defendants in M.D.L. 310 account for approximately 75% of the total industry sales. Thus, settlement market share points represent approximately 1.33 times each defendant's actual total market share.

—and negotiated successive settlements with each corporation in each group, as illustrated in the following table.[7]

Company	Amount Per Point ($ million)	Market Share	Settlement Date
FELONY INDICTEES			
International Paper	1.0	8.3	8-24-78
Champion	4.5	5.36	12-18-78
Weyerhaeuser	5.0	7.83	1- 6-79
Owens-Illinois	6.0	5.45	1-12-79
Olinkraft	6.0	1.22	1-12-79
Continental Group	6.5	4.22	1-16-79
MISDEMEANOR INDICTEES			
Boise Cascade	3.5	2.82	12-18-78
Container Corp.	4.0	8.56	1- 6-79
Inland Container	4.75	7.29	1-18-79
Stone Container	4.75	3.05	1-18-79
St. Joe Paper Co.	4.75	2.62	1-18-79
UNINDICTED COMPANIES			
St. Regis Paper Co.	.5	3.97	7-21-78
Union Camp	2.0	3.7	12-13-78
Diamond International	2.0	.5	12-14-78
Dura Container	2.0	.37	12-14-78
Chesapeake Corp.	2.4	1.26	12-18-78
Longview Fibre	2.5	2.58	12-18-78
Willamette Industries	2.7	4.18	12-18-78
Menasha Corp.	2.75	1.67	12-18-78
MacMillan-Bloedel	4.0	2.11	12-18-78
U.S. Corrugated	4.0	.76	1-25-79
Green Bay Packaging	3.25	1.71	1-25-79

This chronology demonstrates that plaintiffs in M.D.L. 310 required each successive settling defendant within each group to pay an ever greater amount in proportion

[7] The table reflects plaintiffs' grouping and the settlement of each corporation in each group in chronological order, expressed in terms of millions of dollars per point of market sales. Thus, as shown in the table, International Paper with 8.3% of the market settled for 1.0 per point, or $8.3 million.

to its sales of corrugated containers and sheets than the preceding defendant in its group. Plaintiffs' ability to coerce successive escalation settlements from individual defendants in each group rested on the simple but pernicious fact that as each successive settlement was reached, plaintiffs claimed that the potential damage exposure to each defendant which had not yet settled would increase by geometric proportions.[8] Plaintiffs obtained ever greater

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[8] The Senate Judiciary Committee described the exploding potential liability on nonsettling defendants:

> The *Corrugated Container* litigation provides an excellent example for illustrating how today's vast damage claims are used unfairly to "whipsaw" settlements. . . . Apparently because of the large number of defendants and the disparity in the size, market share, and involvement in the alleged conspiracy, no sharing agreement existed. This, combined with the unavailability of contribution, made possible a classic example of what one witness called the whipsaw "game theory" in application.
>
> The strategy of the plaintiffs was to break the defendants' ranks by offering discounted settlements to a few initially in order to pressure subsequent settlements at a higher price. The plaintiffs were successful, settling with the first defendant at $500,000 per percentage point of market share, and the second at $1 million. The second settlement was the more significant, for it was with a defendant which had the second largest market share (8.3%) and which was to plead nolo contendere in the criminal case. The $8.3 million settlement was clearly beneficial to the defendant because its potential liability for its own sales alone ranged from $50 to $250 million, and its total potential liability for the industry's sales ranged from over $250 million to well over $3 billion—depending on the damage estimate used.
>
> The sum deducted from the potential liability facing the other 35 defendants was only $8.3 million, however, not the $50-250 million traceable to the settling defendant's own sales. Since this defendant was now protected from having to share in paying off that sum, the liability of the other defendants thus increased for all practical purposes by that amount over-

leverage in each succeeding settlement negotiation without regard to the probability of class recovery against that individual corporation.[9]

The Third Circuit in *Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573, 587 (3d Cir. 1979), noted that "courts have been wary of permitting 'overkill' recoveries, whose punitive impact may unduly cripple a defendant and lead to an overall deleterious effect upon competition." In M.D.L. 310, as a result of plaintiffs' settlement tactics, plaintiffs claim that Mead is liable for 100 percent of any damages in M.D.L. 310 even though it accounts for only approximately 2½% of the corrugated container industry's sales because the market shares of the defendants who settled were not withdrawn from the case.[10] In fact, plaintiffs in M.D.L. 310 demanded during all settlement negotiations the non-negotiable term that settling defendants' market shares remain in the lawsuit. Of course, in the absence of contribution, the settling defendants also had no incentive to remove their market shares from the lawsuit.

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night. This dramatic escalation in liability increased the settlement pressure as other defendants—now paying at a rate of $2 million a point and rising—sought to protect themselves. Because the damages attributable to these settling defendants also remained in the case, the damage exposure and settlement price thus continued to increase greatly for nonsettling defendants every time another defendant settled.

S. Rep. No. 428, 96th Cong., 1st Sess. 14-15 (1979).

[9] If this scenario were carried to its logical conclusion, a nonsettling defendant with a 1% market share could, if all other defendants settled, be potentially liable for damages based upon 100% of an industry's sales.

[10] In M.D.L. 310, plaintiffs admitted that each settling defendant "agreed to leave its sales in the lawsuit, thus making nonsettling defendants potentially liable for the full damage of the conspiracy." Memorandum of Class Plaintiffs in Support of Their Motion for Preliminary Approval of All Settlements, at 34.

B. The Settlements Were Extortionate.

The extortionate nature of the successive escalation settlement agreements in M.D.L. 310 becomes readily apparent upon analysis, as demonstrated by the following examples:

1. International Paper, the first of the felony indictees to settle, bought its peace for $8.3 million, or approximately $1.0 million per "point." Continental Group, the last of the felony indictees to settle, paid $27,430,000, or $6.5 million per "point," the highest rate of any settling defendant and six and one-half times greater than International Paper. International Paper, a company with twice Continental's market share, was permitted to settle for less than one-third of Continental's settlement simply because of its early position in the escalation timetable. If Continental had settled at $1 million per point, as did International Paper, its settlement would have been $4,220,000, not $27,430,000. This $23 million difference bears no relationship to relative market share or to relative culpability—International Paper pleaded *nolo contendere* whereas Continental pleaded not guilty and *was acquitted at the criminal trial*—or to the merits of plaintiffs' claims—both settlements were concluded before any significant civil discovery commenced. The Continental settlement is plainly and simply attributable to the enormously increased liability that plaintiffs claimed faced Continental as a result of prior settlements. After the International Paper and St. Regis settlements, the remaining defendants who had not settled accounted for approximately 88 percent of defendants' sales. By the time Continental settled, however, the nonsettling defendants accounted for less than 40 percent of defendants' sales. Continental's increased damage exposure under plaintiffs' theory was created because no claim reduction was included in any of the preceding settlements and there was no right of contribution among defendants.

2. Container Corporation of America was charged with a misdemeanor. Despite a market share virtually identical to International Paper, it paid $34.2 million, or more than four times the amount paid by International Paper, a felony indictee.

3. Although U.S. Corrugated Fibre-Box was not indicted and had the smallest market share of all defendants, it settled at a rate eight times higher than St. Regis and four times higher than International Paper.

4. Even though petitioner Georgia-Pacific was identified in the criminal cases as a *victim* of the alleged conspiracy, it was forced to settle with plaintiffs for $3 million. Thus, the absence of contribution allowed *plaintiffs* to victimize Georgia-Pacific.

5. The final settlement negotiated before the criminal verdict conclusively demonstrates the extortionate nature of the M.D.L. 310 settlements. George Kress, founder and president of Green Bay Packaging Co., Inc. ("Green Bay"), testified before the Senate Judiciary Committee's Subcommittee on Antitrust, Monopoly, and Business Rights concerning the Green Bay settlement. Mr. Kress testified that Green Bay, which was neither indicted nor named as an alleged co-conspirator in the criminal case, had decided to prove its innocence at trial in M.D.L. 310. After defendants having over 80 percent of sales settled, Green Bay learned that it could settle the case for $3.7 million per point, or 7.5 times the St. Regis settlement, on a take it or leave it basis. At this point, Green Bay calculated its potential liability in M.D.L. 310 to be $5 billion under plaintiffs' theory, an amount which not only would bankrupt Green Bay but also would immediately destroy its ability to borrow capital in financial markets.[11] Green Bay reluctantly

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[11] *The Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 33-34 (1979).

settled at the amount demanded by plaintiffs only after the full impact of its potential liability became apparent. As Mr. Kress testified:

> The effect of this extortive settlement practice upon a small, family-owned and managed business is catastrophic. We were threatened with a loss of over fifty years of effort and coerced into paying an exorbitant settlement rather than being afforded the privilege of ultimately proving our corporate innocence.[12]

At the trial against Mead, the jury in response to a special verdict form made a finding that Green Bay was not a co-conspirator. Yet, because of plaintiffs' coercive settlement tactics, which utilized the Rule 23 class action device coupled with "no contribution" as a club, Green Bay had been forced to settle at an exorbitant price.

The district court in M.D.L. 310 recognized the inherent coerciveness of the M.D.L. 310 escalation settlements:

> It appears that Westvaco seeks contribution primarily to avoid the coercive impact to it, as a late-settling or non-settling defendant, of the possibility of enormous damages being assessed against it. *That this possibility is inherently coercive is undisputable. . . . Even a defendant relatively certain of a judgment in his favor must have serious doubts about risking such exposure by going to trial.* (Emphasis added.) [13]

What the district court in M.D.L. 310 acknowledged has become commonplace in antitrust class actions. *See, e.g., Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226, 234 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Shapiro*

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[12] *Id.* at 35.

[13] Memorandum Opinion, *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (May 30, 1979).

v. *General Motors Corp.*, 472 F. Supp. 636, 660 (D. Md. 1979); *Arth Main Street Drugs* v. *Beer Distributors, Inc.*, 26 F.R. Serv. 2d 87 (N.D. Ind. 1978); *Hooley* v. *Red Carpet Corp. of America*, 1975 Trade Cas. ¶ 60,285 (D. Ore. 1975), *appeal dismissed*, 549 F.2d 643 (9th Cir. 1977); *Alsup* v. *Montgomery Ward & Co.*, 57 F.R.D. 89, 93 (N.D. Cal. 1972).

Furthermore, plaintiffs' "whipsaw tactics" [14] in M.D.L. 310 are even more objectionable than the "most favored nations" clause, the use of which in class action settlements has been consistently condemned by federal courts and the *Manual For Complex Litigation.* In each instance, not only can it be anticipated that a defendant whose guilt is clearest or whose pocket is deepest will settle early, but also a floor (or a built-in escalation factor) can be created for subsequent negotiations which has no bearing on the probability of class recovery against that defendant.

> As a result, a trial may be forced which nobody wants under circumstances in which all concerned, including the court, agree that a smaller settlement with the late-settling defendants would be fair and reasonable.

Manual For Complex Litigation, § 1.46 at 63. This is precisely the situation in M.D.L. 310. Mead faced an unacceptable choice: either capitulate to escalation settlement tactics amounting to "legalized blackmail" or go to trial and risk exposure under plaintiffs' theory to an inordinate and exorbitant judgment for damages based upon not only its own market share but also the market shares of all other defendants who had previously settled.

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[14] *See* S. Rep. No. 428, 96th Cong., 1st Sess. 2 (1979).

III. CONTRIBUTION IN ANTITRUST CLASS ACTIONS WOULD PREVENT THE MISUSE OF RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Without a right to contribution among antitrust defendants, the class action provisions of Rule 23 of the Federal Rules of Civil Procedure combined with the rule of joint and several liability in civil damage actions and the mandatory treble damage remedy of Section 4 of the Clayton Act, 15 U.S.C. § 15, permit class plaintiffs to coerce settlements in antitrust class actions without regard to the merits of their claims. As the Third Circuit cautioned in *Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573, 586-87 (3d Cir. 1979): "Notwithstanding the seriousness of the *per se* violation present in this case, the judiciary should not be hasty to allow the treble damage action to become so destructive a force, when Congress intended only that it be used as a weapon to enforce the antitrust laws."

Federal courts have expressed increasing concern that the aggregation of damage claims in class actions may coerce settlements from defendants and force them to abandon meritorious defenses. Thus, this Court in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978), observed:

> Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.

In *Hooley* v. *Red Carpet Corp. of America*, 1975 Trade Cas. ¶ 60,285 at 66,112 (D. Ore. 1975), *appeal dismissed*, 549 F.2d 643 (9th Cir. 1977), the court acknowledged that the enormous risk of classwide treble damage liability "may well result in some or all of the defendants opting for a settlement . . . whether they were guilty of the plaintiffs' allegations or not." *See also Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345-46 (1979) (Rehnquist, J., concurring); *Kline* v. *Coldwell, Banker & Co.*, 508

F.2d 226, 234 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). The need for contribution among antitrust defendants to strike an appropriate balance in the settlement process and to protect nonsettling defendants from disproportionate liability has become even more acute with the proliferation of class actions.[15]

M.D.L. 310 vividly demonstrates that "unless prudence and caution are exercised by the Bench and Bar, the Class Action device can be transformed from a useful tool to an *engine of destruction.*" (Emphasis added.)[16] The absence of contribution among antitrust defendants will continue to permit plaintiffs to use class certification to coerce unjust settlements and to transform Rule 23 into a "Frankenstein monster."[17] This harsh epithet is frightfully apropos to that which occurred in M.D.L. 310. It is precisely the abuse of Rule 23 engineered by plaintiffs in M.D.L. 310 that recognition of contribution among antitrust defendants would guard against. The right of contribution would deter only "unfair settle-

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[15] *See The Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 19 (1979) (testimony of John Shenefield, Assistant Attorney Gen., Antitrust Div., Dept. of Justice); *id.* at 76 (testimony of Robert P. Taylor, Director, ABA Task Force on Contribution); *see also* S. Rep. No. 428, 96th Cong., 1st Sess. 11 (1979) ("[T]he problem of contribution in price-fixing cases is one of relatively recent origin. As the hearing record indicates, the vast class action damage exposure from which the problem results did not surface until the 1970's, after the revision of Rule 23 to permit the modern class action in 1966 . . .").

[16] Oral Opinion in *Smith* v. *Beneficial Finance Co.*, Civ. Nos. 860-71, 861-71, 862-71 (D.N.J.), *quoted in* American College of Trial Lawyers, *Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure*, III (1972).

[17] *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 572 (2d Cir. 1968) (Lumbard, C. J., dissenting).

ments based on the risk of massive liability, without regard to culpability or damage caused." [18]

The rule against contribution has long been criticized by commentators precisely for its coercive effects on settlements in antitrust class actions.[19] The class action device, unfettered by contribution among antitrust defendants, permits plaintiffs to aggregate trivial claims "into enormous sums so crushing on the defendants as to induce huge settlements to avoid destruction." [20] Recently, the absence of contribution in antitrust class actions was criticized "because of the possible overwhelming liability of one company for the damages of an entire conspiracy and of the ability of plaintiffs to coerce settlements from defendants who fear that liability." [21]

The certification of a large antitrust class action without rights of contribution among defendants gives rise

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[18] ABA, Antitrust Section, *Resolutions and Report of the Section of Antitrust Law of the American Bar Association on Proposed Amendment of the Clayton Act to Permit Contribution in Damage Actions Brought Thereunder*, 8 (September 6, 1979), *reprinted in*, 936 Antitrust & Trade Reg. Rep. (BNA) E-2 (October 25, 1979); *see also* S. Rep. No. 428, 96th Cong., 1st Sess. 19 (1979) ("Plaintiffs' lawyers have testified that [contribution] will undermine the settlement process and lead to protracted antitrust suits, bottling up the courts for years. The committee rejects this scenario, finding that the effect of [contribution] would simply be to lessen the coercive nature of some of the plaintiffs' lawyers negotiations, and that the only settlements [contribution] will discourage in the long run are those it is intended to discourage—namely coerced settlements").

[19] Corbett, *Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damage Actions*, 31 Fordham L. Rev. 111 (1962); Paul, *Contribution and Indemnification Among Antitrust Coconspirators Revisited*, 41 Fordham L. Rev. 67 (1972); *see also Contribution Among Antitrust Defendants*, 33 Vanderbilt L. Rev. 979 (1980).

[20] Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 206 (1976).

[21] *Contribution In Private Antitrust Actions*, 93 Harv. L. Rev. 1540 (1980).

to such tremendous pressures to settle before trial that the class action device has been aptly characterized by Professor Handler as a form of "legalized blackmail":

> Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail. If defendants who maintain their innocence have no practical alternative but to settle, they have been *de facto* deprived of their constitutional right to a trial on the merits. The distinctions between innocent and guilty defendants and between those whose violations have worked great injury and those who have done little if any harm become blurred, if not invisible. The only significant issue becomes the size of the ransom to be paid for total peace.[22]

Thus, there is enormous settlement pressure even on innocent defendants.[23] Defendants are compelled to settle from fear of liability for the damages of an entire alleged conspiracy.[24]

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[22] Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-third Annual Antitrust Review*, 71 Columbia L. Rev. 1, 9 (1971).

[23] Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 207 (1976) ("No matter how sincere is [defendants'] belief in the innocence of their acts, they have little practical alternative but to settle, and certainly no alternative but to join in any settlement by [other defendants] or be left with a potential liability measured by the total damages a jury might find, trebled, less only the settlement amounts"); *The Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 75 (1979) (testimony of Robert P. Taylor, Director, ABA Task Force on Contribution) (estimates of potential liability for a "completely foundationless suit" range from 5% to 25%).

[24] *Contribution Among Antitrust Defendants*, 33 Vanderbilt L. Rev. 979, 995 (1980) ("[C]ontribution eliminates coercive or 'whip-saw' settlements in large cases. For example, in *In re Cor-*

Furthermore, when the potential damage exposure of a class action exceeds the net worth of a corporate defendant, the possibility of corporate destruction becomes real. Corporate management naturally tends to seek insurance against whatever remote chance of success plaintiffs may have. The settlement agreement becomes the corporation's life insurance policy, and the amount of settlement, its premium. Thus, "any settlement within [defendants'] purse, as a practical matter, may be their only chance for survival." [25]

Over the years, eminent plaintiffs' counsel have acknowledged the coercive effects of class certification by underscoring that such actions are invariably settled:

> *I have seen nothing so conducive to settlement of complex litigation as the establishment by the court of a class. . . .* When two very competently represented and major litigants have settled, I think it shows this. It shows that the problem is manageable. It shows that they feel that *this is the way that the litigation can be disposed of by settlement, namely, by having a class;* whereas, if there were no class, it would not be disposed of by settlement. *So I think that you sow the seed for the possibility of a settlement.* (Emphasis added.) [26]

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rugated Container Antitrust Litigation defendants had little or no choice but to settle, even if they were innocent of wrongdoing, because of the potentially staggering liability" claimed by plaintiffs) (footnote omitted); *The Antitrust Equal Enforcement Act of 1979: Hearing on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 68 (1979) (statement of Donald Kempf) ("[T]he practicalities of the situation are such that, increasingly, businessmen are concluding that they have no real option but to settle such antitrust claims, even when they are confident that they did nothing wrong and have a solid defense").

[25] Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 207 (1976).

[26] *City of Philadelphia* v. *American Oil Co.*, Civ. No. 647-68 (D.N.J.), Transcript of Proceedings, 11 (March 1, 1971).

Furthermore, the Second Circuit in *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and class action dismissed on other grounds*, 417 U.S. 156 (1974), astutely predicted that injustices would occur when the class action device is misused to extract settlements from antitrust defendants who are not entitled to contribution:

> There is reason to believe that the practical effect of these procedures, and the fact that possible recoveries run into astronomical amounts, generate more leverage and pressure on defendants to settle, even for millions of dollars, and in cases where the merits of the class representatives claim is to say the least doubtful, than did the old-fashioned strike suits made famous a generation or two ago by Clarence H. Venner.

Id. at 1019. As demonstrated above, this is precisely what happened in M.D.L. 310 without the right of contribution among defendants. The abuses to which Rule 23 is susceptible can be effectively eradicated by this Court's recognition of rights of contribution and claim reduction among antitrust defendants.

Not only has the lack of contribution rights allowed class plaintiffs in M.D.L. 310 to subvert the settlement process, but the extortionate settlements obtained through the mechanism of class certification have, in effect, rewritten substantive provisions of the antitrust laws.[27] Section 4 of the Clayton Act, 15 U.S.C. § 15, limits the recovery of treble damages to those who can prove an injury to their business or property by reason of a viola-

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[27] Rule 23 is a rule of procedure which does not alter substantive statutory provisions. *Snyder* v. *Harris*, 394 U.S. 332 (1969).

tion of the antitrust laws.[28] With contribution unavailable among antitrust defendants, plaintiffs in M.D.L. 310 grossly distorted these substantive provisions by using the class action device to coerce settlements which have no bearing whatever either to the actual damages which may have been suffered by class plaintiffs or to the relative culpability of each settling defendant. Thus, without contribution, antitrust class actions permit plaintiffs to shift private antitrust policy from compensation to confiscation. And the larger the stakes, the greater the incentive for plaintiffs to attempt to do just that, as has been accomplished by plaintiffs in M.D.L. 310.

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[28] This principle was affirmed by this Court in *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972), which held that recovery in a private antitrust action is limited to *actual* damages trebled: "In enacting [the antitrust] laws, Congress had many means at its disposal to penalize violators. It could have, for example, required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected. Instead, Congress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation." *Id.* at 262.

CONCLUSION

For the foregoing reasons, The Mead Corporation respectfully submits that this Court should reverse the decision of the Court of Appeals for the Fifth Circuit in *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, and remand to the district court with instructions to permit rights of contribution and claim reduction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 1980, three copies of the Brief of Amicus Curiae The Mead Corporation In Support of Petitioner Texas Industries, Inc. were mailed, postage prepaid, to the following:

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